UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JING FANG LUO, and SHUANG QIU HUANG, individually and on behalf of others similarly situated,

Plaintiffs,

-against-

PANARIUM KISSENA INC. d/b/a Fay Da Bakery; PANARIUM INC. d/b/a Fay Da Bakery; BOULANGERIE DE FAY DA INC. d/b/a Fay Da Bakery; Patisserie de fay da, LLC d/b/a Fay Da Bakery; LE PETIT PAIN INC. d/b/a Fay Da Bakery; BRAVURA SKY VIEW CORP. d/b/a Fay Da Bakery; LA PAN MIETTE INC. d/b/a Fay Da Bakery; FAY DA (QUEENS) CORP. d/b/a Fay Da Bakery; FAY DA MOTT ST., INC. d/b/a Fay Da Bakery; FEI DAR, INC. d/b/a Fay Da Bakery; LE PAIN SUR LE MONDE INC. d/b/a Fay Da Bakery; BRAVURA LLC d/b/a Fay Da Bakery; CHI WAI CORP. d/b/a Fay Da Bakery; PHADARIAN CORP. d/b/a Fay Da Bakery; FAY DA MAIN STREET CORP. d/b/a Fay Da Bakery; TORTA DI FAY DA d/b/a Fay Da Bakery; BRAVURA PATISSERIE d/b/a Fay Da Bakery; NICPAT CAFÉ INC. d/b/a Fay Da Bakery; FAY DA MANUFACTURING CORP.; FAY DA HOLDING CORP. d/b/a Fay Da Bakery; FAY DA HOLDING GEN 2 CORP. d/b/a Fay Da Bakery; HAN CHIEH CHOU and KELLEN CHOW.

Defendants.

15-cv-03642 (WFK) (SLT)

ECF CASE

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION AND COURT AUTHORIZED NOTICE

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I. PRELIMINARY STATEMENT/FACTS

The "modest factual showing" standard for conditional FLSA certification does not apply to claims without merit. Even if it did apply, Plaintiffs have failed to meet this burden here and their motion for conditional certification and court-authorized notice should be denied. Plaintiffs' main allegation is that a meal credit taken brought their wages below the minimum. This is not a violation, as the law provides for meal credits. Plaintiffs' individualized claims that they may have not actually eaten the provided meal does not provide a basis for a cause of action and it certainly does not provide a showing that they are similarly situated to anyone else. Plaintiffs' other FLSA claim is that the time spent washing uniforms should be compensated. Once again, there is no cause of action here as the undisputed facts are that the alleged uniforms were wash and wear and the FLSA does not require compensation for time spent washing the shirts that you must wear to work.

In addition to having no legal basis for a case, Plaintiffs' Amended Complaint and Affidavits fail to provide a basis for a collective action. There is no basis to include 23 Defendants and 19 locations when Plaintiffs did not work at those locations. Plaintiffs have not worked at any of the Defendant locations within three years of the filing of this motion, providing no factual nexus whatsoever with the purportedly similarly situated workers. Invoking the names of co-workers at a few other locations does not provide sufficient basis either. Plaintiffs do not even assert that the meal credit and uniform pay issues are FLSA violations. This should be rejected.

Plaintiffs have also failed to make any showing of an interest among putative class members in opting in to this matter. Tellingly, this matter has been litigated for almost 12 full months already and there have been no opt in filings at all, and this case was on the heels of a similar case brought by Plaintiffs' counsel in this court (*Yu v. Panarioum Kissena Inc. et al.* 14- civ-4385) (CBA)(MDG)(EDNY), which also had no opt-ins.

Finally, Plaintiffs' proposed Notice is flawed in many respects, including being overbroad, filled with inaccurate information or references to causes of action that do not exist in this case and otherwise unfairly prejudices Defendants. Further, any such Notice should only go back 2 years and not 3 years. Defendants were previously investigated and sued by the Secretary of Labor. (*Solis v Fay Da Café Corp. et al.*, 12-cv-2566 (FB)(CLP) (EDNY) and no meal credit or uniform maintenance violations were found, let alone alleged. As such, Plaintiffs will be unable to show any willfulness.

Instead of a collective action notice, this matter should proceed with discovery first, as it will become clear that Plaintiffs have no case and their individualized claims are both without merit and have no basis for a collective action.

II. ARGUMENT

A. Conditional Certification Is Not Warranted As Plaintiffs Have Not Met The Threshold Standard

In order for a court to conditionally certify a collective action, the plaintiff bears the burden of proof to make a "modest factual showing" sufficient to demonstrate that "they and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law." *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010). In order to meet the "modest factual showing" requirement plaintiff must offer "'substantial allegations' of a factual nexus between [them] and potential opt-in plaintiffs" with regard to their employer's alleged FLSA violation. *Morris v. Lettire Constr., Corp.*, 896 F.Supp.2d 265, 269 (S.D.N.Y. 2012).

Although courts have found that a plaintiff need only make a "modest factual showing" at this stage, the plaintiff's burden is "not non-existent," *Romero v. H.B. Auto. Grp., Inc.*, No. 11 CIV. 386 CM, 2012 WL 1514810, at *10 (S.D.N.Y. May 1, 2012), and the court must "take a measured approach when addressing a request for collective action certification, mindful of the potential burden associated with defending against an FLSA claim involving a broadly defined collective group of plaintiffs." *Colozzi v. St. Joseph's Hosp. Health Ctr.*, 595 F. Supp. 2d 200, 207 (N.D.N.Y. 2009) (internal citations omitted). *See also Guillen v. Marshalls of MA, Inc.*, 841 F. Supp. 2d 797, 803 (S.D.N.Y. 2012), *adopted,* No. 09 CIV. 9575 LAP GWG, 2012 WL

2588771 (S.D.N.Y. July 2, 2012) ("it would be a waste of the [c]ourt's and the litigants' time and resources to notify a large and diverse class only to later determine that the matter should not proceed as a collective action because the class members are not similarly situated"). Indeed, conditional certification is "not automatic." *Jenkins v. TJX Companies Inc.*, 853 F. Supp. 2d 317, 322 (E.D.N.Y. 2012) (quoting *Vasquez v. Vitamin Shoppe Indus. Inc.*, No. 10 CIV. 8820 LTS THK, 2011 WL 2693712, at *3 (S.D.N.Y. July 11, 2011)).

There must be some substance to Plaintiffs' allegations for a court to conditionally certify. *Guillen v. Marshalls of MA, Inc.*, 750 F. Supp. 2d 469, 480 (S.D.N.Y. 2010) ("In presenting evidence on the appropriateness of granting collective action status, the plaintiff's burden may be very limited, and require only a modest factual showing, but the burden is not non-existent and the factual showing, even if modest, must still be based on some substance") (internal quotation marks and citations omitted). As Plaintiffs have failed to offer "substantial allegations" or to show a "factual nexus" with the putative opt ins and failed to show any violation of the law, conditional certification should be denied.

1. Plaintiffs Have Not Offered "Substantial Allegations" Or A "Factual Nexus" Sufficient To Meet Their Burden Of Proof

After approximately one year of litigation in this matter, Plaintiffs have offered nothing to substantiate their allegations that this matter should go forward as a collective action. Plaintiffs offer only their own threadbare Affidavits[1] in support of this motion for collective certification. First, the Affidavits submitted are in English even though Chinese is the language of each affiant. (Luo Aff. ¶ 30.); (Huang Aff. ¶ 20.) Plaintiffs have failed to provide certified translations of their original language Affidavits and so these Affidavits should be deemed

[1] Jing Fang Luo Affidavit will be cited as "(Luo Aff. [¶].)", Shuang Qui Huang Affidavit will be cited as "(Huang Aff. [¶].)" and their Memorandum of Law in Support of Plaintiffs' Motion for Conditional Certification and Court-Authorized Notice will be cited as "(Plaintiffs' Mem. at [p.].)"

inadmissible and not considered in this motion. *Huang v. J & A Entm't Inc.*, No. CV-09-5587 (ARR), 2010 WL 2670703, at *1 (E.D.N.Y. June 29, 2010); *Espinoza v. 953 Associates LLC*, 280 F.R.D. 113, 118 (S.D.N.Y. 2011).

Even if they could properly be considered, the Affidavits provide no meat for the motion. They follow identical formulas and wording and simply list names of people who allegedly work at Defendants and allege that they must have been subject to similar meal credits and must have had to wash their uniforms. Plaintiff Luo only alleges she worked at 3 locations and Plaintiff Huang worked at the same location as Plaintiff Luo. (Luo Aff. ¶¶ 3, 4, 6.); (Huang Aff. ¶¶ 3, 5.) Yet Plaintiffs ask the Court to include 19 locations in a collective action certification and Notice. The Affidavits fail to provide any basis whatsoever for the allegations and fail to identify the work locations for any other workers. Notably, for the only person identified as working at locations other than those worked at by Plaintiffs, Lu Yang, there is no allegation that these policies existed at the other locations or that these policies were a part of a common policy or plan of all Defendants. (Luo Aff. ¶ 24.) In fact, even though Plaintiff Luo alleges that Lu Yang "worked at, all Fay Da Bakeries" the rest of that very sentence only identifies 3 such locations at which Lu Yang allegedly worked. (Luo Aff. ¶ 24.)

The Huang Affidavit is similarly lacking in support for a collective action and is rife with inconsistencies. For example, Plaintiff Huang alleges she worked at 2 locations, yet her affidavit identifies the exact same location twice. (Huang Aff. ¶¶ 3, 5.) Plaintiff Huang's weak attempt at linking her work location to others should be rejected. Plaintiff Huang only cites to her co-Plaintiff Luo as evidence of a common policy. However, Plaintiff Luo worked at the same location as Plaintiff Huang. (Luo Aff. ¶ 3.); (Huang Aff. ¶ 3.) Further, Plaintiff Huang's only other reference to another worker fails to identify where the worker worked, the dates of employment or the basis for Plaintiff Huang's bald allegations of a common policy. (Huang Aff. ¶ 12.) Plaintiffs merely state, in identical language that: "I know that practice is not limited to the two Fay Da Bakeries where I worked because I have spoken with my coworkers at Fay Da Bakery, including . . . (Luo Aff. ¶ 14.); (Huang Aff. ¶ 12.) *Jenkins*, 853 F. Supp. 2d at 325 (denying conditional certification based upon, *inter alia*, the "thin factual support" of plaintiff's deposition and no other declarations). There are no details, no specifics in either the Luo or Huang Affidavits. *Myers*, 624 F.3d at 555 (stating that the plaintiff must offer more than "unsupported assertions" to satisfy its burden at the first stage) (internal quotation marks omitted); *Morris*, 896 F.Supp.2d 265, 269 (same). *See e.g., Guillen*, 750 F. Supp. 2d 469 (denying conditional certification under § 216(b) where conclusory affidavits supplied "virtually no basis on which to conclude" that putative class members were similarly situated); *Mendoza v. Casa de Cambio Delgado, Inc.*, No. 07CV2579 (HB), 2008 WL 938584, at *2-3 (S.D.N.Y. Apr. 7, 2008) (denying conditional certification under § 216(b) where plaintiff relied upon "boilerplate and virtually identical" conclusory affidavits that failed to show factual nexus).

Plaintiffs' Memorandum in Support is also filled with errors in dates, time, misidentifying Defendants from other cases and referencing causes of action that are not even alleged in the Amended Complaint. For example, Plaintiffs allege this matter commenced on November 4, 2015 when in fact it began on June 23, 2015. (Plaintiffs' Mem. at p. 2.); See Dkt. No. 1.[2] Plaintiffs also allege that Defendants answered the Complaint on July 22, 2016 when in fact it was July 22, 2015. See Dkt. No. 31.

Next, Plaintiffs misidentify the issues for this collective action motion. Plaintiffs argue the collective action motion relates to the meal credit and uniforms bringing wages below minimum wage. (Plaintiffs' Mem. at p. 3.) Then Plaintiffs ask the Court to send out a Notice to provide "a single forum in which to determine whether the Defendants' **overtime policies** are lawful." (Plaintiffs' Mem. at p. 5.) [emphasis added]. Plaintiffs once again have misidentified and confused the issues by either cutting and pasting from irrelevant cases or failing to identify the issues at hand. Plaintiffs' own Amended Complaint is clearly a "cut and paste" job from other cases, as Plaintiffs reference "McDonald's policy" related to "time spent cleaning and pressing uniforms." (Am. Compl. ¶ 90.) Next, Plaintiffs argue that the "common policy and plan" involved "exempting all of its non-managerial employees from the FLSA and NYLL minimum wage protections." (Plaintiffs' Mem. at p. 9.) [emphasis in the original]. It is puzzling as to how Defendants are allegedly "exempting" workers from the FLSA and the NYLL, but it is clearly not a valid basis for conditional certification based upon the facts alleged herein. Moreover, Plaintiffs cannot rely on the NYLL to justify an FLSA collective action certification. Conditional certification pursuant to section 216(b) must be predicated on FLSA violations not the NYLL. *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 244 (2d Cir. 2011)("The NYLL…does not have a provision for collective actions.") The Court should not grant collective action certification based on poorly crafted arguments that do not even apply to this matter.

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[2] "Dkt. No. __" as used herein refers to ECF Docket Number for this matter.

Plaintiffs' citation to *Francis v. A & E Stores, Inc.*, No. 06CIV1638(CS)(GAY), 2008 WL 4619858 (S.D.N.Y. Oct. 16, 2008) (Plaintiffs' Mem. at p. 8.) in support of certification is misplaced. The *Francis* court found the deposition testimony of defendant's vice president of operations and of a district manager supported the allegation that a common policy existed. By contrast, Plaintiffs have no such deposition support herein. Further, in *Jacobsen v. Stop & Shop Supermarket Co.*, No. 02 CIV. 5915 (DLC), 2003 WL 21136308 (S.D.N.Y. May 15, 2003)

(Plaintiffs' Mem. at p. 12.), the court granted certification AFTER discovery was completed where a better record had been established of the facts to make such a determination of conditional certification. Similarly, the *Masson v. Ecolab, Inc.*, No. 04 Civ. 4488, 2005 WL 2000133, at *14 (S.D.N.Y. Aug. 17, 2005) case (Plaintiffs' Mem. at p. 8.) is distinguishable in that the Court allowed conditional certification based on defendant's admission of a companywide policy. It makes sense to go forward with discovery to establish the necessary framework for a motion of this type instead of ruling for certification now.

The *Sipas v. Sammy's Fishbox, Inc.*, No. 05 CIV. 10319 (PAC), 2006 WL 1084556 (S.D.N.Y. Apr. 24, 2006) case sited by Plaintiffs (Plaintiffs' Mem. at p. 8.) is also distinguishable in that, the *Sipas* court granted conditional certification at locations where affiants had actually worked. By contrast, Plaintiffs herein are asking the Court to certify 19 locations when they only worked at 3 such locations. Further, Plaintiffs citation to *Toure v. Cent. Parking Sys. of New York*, No. 05CIV.5237(WHP), 2007 WL 2872455 (S.D.N.Y. Sept. 28, 2007) (Plaintiffs' Mem. at p. 12.) is similarly misplaced in that the *Toure* case involved only one location. Here, Plaintiffs ask for certification without support for 19 locations. *Castro v. Spice Place, Inc.*, No. 07 CIV. 4657, 2009 WL 229952, at *3 (S.D.N.Y. Jan. 30, 2009) (denying certification as plaintiffs did not make the necessary showing that the alleged actions were a reflection of a common policy, maintained by all defendants, in violation of the FLSA.)

Plaintiffs also fail to show a factual nexus between themselves and any putative opt ins, as Plaintiffs were not employed by Defendants during the time period applicable to the purported opt in period. Plaintiffs were not employed by Defendants after May 11, 2013 (Am. Compl. ¶¶ 15-16.), more than three years prior to the filing of this motion, the longest permitted statute of limitations. As such, Plaintiffs will be unable to prove any factual nexus whatsoever to any potential opt in and so conditional certification should be denied. *Seever v. Carrols Corp.*, 528 F. Supp. 2d 159, 174 (W.D.N.Y. 2007) (denying conditional certification where, *inter alia*, there was no evidence as to "whether these acts occurred during the time period relevant to this action.")

Further, Plaintiffs have failed to show this Court that there are any alleged similarly situated employees who are even interested in joining this action, as not one opt in form other than Plaintiffs have been filed with the Court. Finally, Plaintiffs' utter failure to meet their burden of proof is magnified by the fact that they have already had the benefit of knowing what happened in the two cases against Defendants cited herein, and nearly a year of litigation and have still failed to come up with any reason for this court to conditionally certify this action. *Vargas v. HSBC Bank USA, N.A.*, No. 11 CIV. 7887 DAB, 2012 WL 10235792, at *1 (S.D.N.Y. Aug. 9, 2012) (denying conditional certification where plaintiff failed to produce any other potential opt-ins after 6 weeks of discovery).

Plaintiffs' unsupported assertions fail to meet even their modest factual showing burden and so conditional certification should be rejected.

2. Since A Meal Credit And Wash And Wear Uniforms Are Permissible Under The FLSA Plaintiffs Cannot Meet Their Burden Of Proof That A Violation Occurred

Plaintiffs also fail to meet their burden to show that a violation occurred and so collective action certification should be denied. Plaintiffs put forth two alleged violations to form the basis for the conditional certification; meal credits and wash and wear uniforms. As neither of these causes of action represent a violation of the FLSA, Plaintiffs' motion should be denied. *Brickey v. Dolgencorp., Inc.*, 272 F.R.D. 344, 347 (W.D.N.Y. 2011) (quoting *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 387 (W.D.N.Y. 2005)). *See also Guillen*, 750 F. Supp. 2d at 475.

First, Plaintiffs allege that a meal credit with a corresponding deduction from wages is somehow a violation of the FLSA. (Am. Compl. ¶ 1.) In fact, taking a meal credit is clearly allowed under the law. 29 C.F.R. § 531.31.

Next, Plaintiffs seem to allege that a meal credit for minimum wage workers are *per se* unlawful as it will bring a workers' pay below the minimum wage. (Plaintiffs' Mem. at p. 3.); (Am. Compl. ¶ 5.) This is demonstrably false and contrary to regulations and law. 29 C.F.R. § 531.31. *See also Herman v. Collis Foods, Inc.*, 176 F.3d 912 (6th Cir. 1999).

Finally, Plaintiffs appear to also argue that they did not actually take the meal so a meal credit is improper. This argument is also contrary to existing case law and should be rejected. The courts have rejected the concept of voluntariness for meals. *Collis Foods*, 176 F.3d 912 (acceptance of the meal is not required for an employer to take a meal credit). Indeed, the Field Operations Handbook of the USDOL instructs that:

> WH no longer enforces the 'voluntary 'provision with respect to meals. Therefore, where an employee is required to accept a meal provided by the employer as a condition of employment, WH will take no enforcement action, provided the employer take credit for no more than the actual cost incurred. DOL Field Operations Handbook section 30c01(b).

Courts within this circuit have followed the *Collis Foods* line of cases. *See Archie v. Grand Cent. P'ship, Inc.*, 86 F. Supp. 2d 262, 267 n.2 (S.D.N.Y. 2000) (allowing a meal credit and noting that "Plaintiffs' interpretation of 29 CFR § 531.30 that acceptance of benefits must be 'voluntary and uncoerced,' has, in any event, been struck down by three courts of appeals as being inconsistent with the statute. *See Herman v. Collis Foods, Inc.*, 176 F.3d 912 (6th Cir. 1999); *Donovan v. Miller Properties, Inc.*, 711 F.2d 49 (5th Cir. 1983); *Davis Brothers, Inc. v. Donovan*, 700 F.2d 1368 (11th Cir. 1983).")

Moreover, by its very nature, figuring out which workers did nor did not actually take a meal on any given day in any given location is individual specific and is not amenable to collective action certification as the workers are not similarly situated.

Plaintiffs' only other alleged basis for an FLSA violation, wash and wear uniform maintenance time (Am. Compl. ¶¶ 84-5.) should also be rejected. The FLSA and its regulations make clear that an employer who provides uniforms that can be washed in a washing machine and worn thereafter does not have to provide money or time for laundering the uniforms. The Department of Labor regulation states that employers need not reimburse employees for maintaining uniforms that "do not generally require daily washing, dry cleaning, commercial laundering, or any other special treatment." 29 C.F.R. § 4.168(b). The Department of Labor, Field Operations Handbook, also specifically provides that "the time spent in washing uniforms will not be considered hours worked for either [minimum wage] or [overtime] pay purposes." Department of Labor, Wage and Hour Division, Field Operations Handbook § 30c12(b)(5). Moreover, Plaintiffs make no allegation that uniform maintenance was required on the job site and; as such, any such activity postliminary to work is not compensable. A number of courts have held that "unless the law, the employer, or the nature of the work requires that a preliminary or postliminary activity be performed on the employer's premises, the time spent on such activity is not compensable." *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 747 F. Supp. 2d 1043, 1053 (E.D. Wis. 2010); *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010) (because police officers were not required to don and doff their uniforms and gear at the workplace, the time spent doing so was not compensable). *Hall v. Guardsmark, LLC*, No. CIV.A. 11-213, 2012 WL 3580086, at *12 (W.D. Pa. Aug. 17, 2012) (denying conditional certification of a uniform maintenance claim).

Further, conditional certification would be inappropriate as to the uniforms, as Plaintiffs have provided no factual nexus whatsoever as to how they maintain their uniforms and how the putative opt ins do so. *Chandler v. Heartland Employment Servs., LLC*, No. CIV.A. 12-4395, 2014 WL 1681989, at *6 (E.D. Pa. Apr. 28, 2014) (The plaintiffs have provided no evidence, beyond speculation, of a factual nexus between the way this policy affected them and the way it has affected the proposed class as a whole. The record does not contain a "modest factual showing" that the proposed class members are similarly situated with respect to the uniform-maintenance claim; nor does it appear that sending an FLSA notice to a potentially vast and still-undefined class will facilitate litigation that is "orderly," "sensible," and "manageable.").

As each alleged violation of the FLSA asserted by Plaintiffs fails as a matter of law, Plaintiffs cannot possibly prove that Defendants had a common policy or plan that violated the law. *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 467 (S.D.N.Y. 2008) ("where a defendant employer shows either that the potential recipients of the notice are not similarly situated to the plaintiff or that it will likely succeed at trial in proving that the employees are not entitled under the FLSA to overtime compensation, a court may refuse to authorize notice or postpone deciding the issue pending further discovery and motion practice.") Evidence that individuals are similarly situated with respect to a lawful policy is insufficient to support conditional certification of a claim that alleges a violation of that policy. *Guillen*, 841 F. Supp. 2d at 801-802.

Thus, the cases cited by Plaintiffs are distinguishable and serve only to emphasize that Plaintiffs have no proof whatsoever to offer that a violation has occurred.

3. There Is No Basis For Equitable Tolling As Plaintiffs Have Waited Almost A Year To File A Motion And No Putative Opt Ins Even Worked At The Time Plaintiffs Were Employed At Defendants

While Plaintiffs seem to request equitable tolling in this motion, see Am. Complaint Wherefore Clause; (Plaintiffs' Mem. at p. 5.), they fail to provide any argument whatsoever for its relevance or necessity. In fact, Plaintiffs' argument seems to morph into one for an extension of the statute of limitations from 2 years to 3 years. (Addressed *infra*). Equitable tolling is a discretionary doctrine that requires the Court to fashion relief that is most appropriate for the facts and circumstances of the particular case. *See Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000) (as to length of tolling, "equitable tolling does not lend itself to bright-line rules." The statute of limitations is not tolled for opt-in plaintiffs until the "date on which [their] written consent is filed in the court in which the action was commenced." 29 U.S.C. § 256(b).) Plaintiffs have waited almost one year to file this motion and have shown no sense of urgency in trying to safeguard any putative opt ins statute of limitations. In fact, there is no time period in which Plaintiffs and any putative opt in even worked at Defendants at the same time.

As Plaintiffs have failed to articulate any reason for equitable tolling, their request should be denied. Alternatively, the Court should hold off on deciding any tolling request until the facts before it are articulated. *Whitehorn v. Wolfgang's Steakhouse, Inc.*, 767 F. Supp. 2d 445, 450 (S.D.N.Y. 2011) (Plaintiffs' request for equitable tolling is denied with the understanding that individual plaintiffs may seek such tolling upon demonstrating its applicability); *Yap v. Mooncake Foods, Inc.*, No. 13 CIV. 6534 (ER), 2015 WL 7308660, at *8 (S.D.N.Y. Nov. 18, 2015) (Plaintiffs' request for equitable tolling is thus denied, but individual plaintiffs may seek such tolling upon opting-in and demonstrating its applicability to his or her case.)

Finally, this Court has previously provided that equitable tolling, if applicable, should only cover the period from the filing of a motion for conditional certification. *Chime v. Peak Sec. Plus, Inc.*, 137 F. Supp. 3d 183, 188 (E.D.N.Y. 2015).

B. Plaintiffs' Proposed Notice Is Inappropriate

While Defendants attempt to list all of its objections to the proposed Notice of Pendency and Consent to Join form below, it is unclear what is being asked of this Court by Plaintiffs. Defendants alternatively ask the Court to Order the parties to negotiate a proposed notice should Plaintiffs' motion be granted. *Cohen v. Gerson Lehrman Grp., Inc.*, 686 F. Supp. 2d 317, 331 (S.D.N.Y. 2010), cited in Plaintiffs' Mem. at p. 8, (ordering the parties to negotiate a proposed notice).

1. The Proposed Notice Is Too Broad – It Should Not Include Employees Who Made Above The Minimum Wage, It Should Not Go Back Over 4 Years, Tolling Is Inappropriate And A 90 Day Opt In Period Too Long

In the event that the Court grants conditional certification, there are many defects in Plaintiffs' proposed Notice that need to be addressed and edited. First, the proposed Notice covers too wide a class of workers. As discussed above, the putative class should not include any workers who earned more than the minimum wage, as any alleged meal credits or uniform cleaning costs would not have brought their claims below the minimum wage and so no FLSA claim is available for these workers.

Second, Plaintiffs' proposed Notice asks the Court to improperly extend the notice period to approximately four (4) years back to June 23, 2012. This is clearly overly broad. At most the notice period should extend only to three (3) years from the Court's Order granting conditional certification. *Enriquez v. Cherry Hill Mkt. Corp.*, No. 10-CV-5616 FB ALC, 2012 WL 440691, at *3 (E.D.N.Y. Feb. 10, 2012) (limiting notice to a 3 year period from the date of the Order, reasoning that "notice to those who may have timely state-law claims, but whose

FLSA claims are time-barred, would serve no proper purpose.") Further, given that Plaintiffs have alleged no facts supporting a willful violation (see arguments *supra*), the notice period should only extend back two (2) years. The statute of limitations under the FLSA is two (2) years, unless the employer's violation was "willful," in which case it is three (3) years. 29 U.S.C. § 255(a). The burden of showing that the employer's alleged violation of the FLSA was willful is on the plaintiff seeking to invoke the extended statute of limitations. *Parada v. Banco Indus. De Venezuela, C.A.*, 753 F.3d 62, 71 (2d Cir. 2014).

Plaintiffs' citation to *Anglada v. Linens "N Things, Inc.*, 2007 WL 1552511, at *8 (S.D.N.Y. May 29, 2007) (Plaintiffs' Mem. at p. 6.) is misplaced for several reasons and, in fact, does not support their motion. First, Plaintiffs refer to the court in *Anglada* as "This Court" implying that Your Honor decided that case. (Plaintiffs' Mem. at p. 6.) This is false. Second, the *Anglada* court actually denied plaintiff's request for certification of a large number of defendant locations. The *Anglada* court limited the certification to only two locations and noted that plaintiff had failed to provide affidavits or declarations from any workers at the other locations sought to be included. Similarly, Plaintiffs herein have failed to provide any supporting affidavits or declarations from anyone whatsoever and identified only 3 locations in which either Plaintiff worked. Plaintiffs' citation to *Fasanelli v. Heartland Brewery, Inc.*, 516 F. Supp. 2d 317, 323 (S.D.N.Y. 2007) (Plaintiffs' Mem. at p. 7.) also references "This Court" even though Your Honor did not decide that case. Further, the Court in *Fasanelli* rejected plaintiff's request for social security numbers and limited contact information to name, address and e-mail. *Id.* Finally, the *Fasanelli* court required plaintiff to include information related to attorneys' fee arrangements with any potential opt ins. This is also missing from Plaintiffs Notice herein. Thus, the notice should be limited to two (2) years and in no event four (4) years or longer. All such references in Plaintiffs' proposed notice to a period back to June 23, 2012 should, therefore be changed.

Plaintiffs also seem to request that equitable tolling apply and that the statute of limitations should be tolled during the notice period. A similar request to toll the statute of limitations to the time of the filing of the Complaint was rejected in *Enriquez*, reasoning that "[i]t is clear, however, that the statute of limitations on an FLSA claim stops only when a potential plaintiff opts in." 2012 WL 440691, at *3. It is also somewhat disingenuous for Plaintiffs to request equitable tolling now when they expressed no such sense of urgency for putative opt ins by waiting nearly 11 months after filing this action in order to make this motion. Plaintiffs' confusing and muddled equitable tolling request should be rejected here as well.

Plaintiffs' case cited in alleged support of its notice, *Diaz v. Scores Holding Co.*, No. 07 CIV. 8718 (RMB), 2008 WL 7863502 (S.D.N.Y. May 9, 2008) is in fact not supportive of Plaintiffs' proposed Notice. The *Diaz* court rejected both an equitable tolling argument and an argument to allow notice beyond 3 years under the FLSA. The *Diaz* notice also allowed only 60 days for an opt in period, not 90 days. Thus, it is not at all clear how this case supports Plaintiffs at all. Similar cases have allowed shorter time periods, including 60 days ordered in Enriquez, 2012 WL 440691 (60 day opt in period is reasonable even with potential difficulties in reaching potential plaintiffs). Courts in this Circuit have regularly ordered opt-in periods within, at most, 60 days. *Guzelgurgenli v. Prime Time Specials Inc.*, 883 F. Supp. 2d 340 (E.D.N.Y. 2012); *Bowens v. Atl. Maint. Corp.*, 546 F. Supp. 2d 55, 85 (E.D.N.Y. 2008); *Gjurovich v. Emmanuel's Marketplace, Inc.*, 282 F. Supp. 2d 101, 106 (S.D.N.Y. 2003).

2. The Class Discovery Plaintiffs Seek Is Improper; Posting Notice Is Unwarranted

The contact information requested by Plaintiffs is also muddled, unclear and improper. In its Preliminary Statement, Plaintiffs seems to request "alternate phone numbers and addresses, last known email addresses, work locations, dates of employment of all the Defendants' former and current non-managerial employees." (Plaintiffs' Mem. at p. 2.) However, later in the brief Plaintiffs seem to request "last known mailing addresses…telephone numbers...Social Security numbers." (Plaintiffs' Mem. at p. 15.) It is unclear what the difference between an "alternate" and "last known address" is as per the request. Further, the requests as far as Defendants can tell, includes addresses, telephone numbers, e-mail addresses and social security numbers. This information is protected by a variety of state and federal laws, *See e.g.*, 18 U.S.C. §§ 2721-2725 (prohibiting disclosure of records constituting "personal information," including names and addresses) and New York Labor Law § 203-d (prohibiting employers from disclosing social security numbers under certain circumstances), and there is no legitimate reason for Plaintiffs to possess this information. In fact, the New York Rules of Professional Conduct, Rule 7.3 prohibit a plaintiff's counsel from soliciting potential clients by telephone. *Gordon v. Kaleida Health*, No. 08-CV-378S, 2009 WL 3334784 (W.D.N.Y. Oct. 14, 2009) (denying plaintiffs' request for phone numbers and other personal information); *Colozzi*, 595 F. Supp. 2d at 210 (limiting discovery to names and addresses). Even cases cited by Plaintiffs limit class disclosure to names and last known addresses. *See Krueger v. New York Tel. Co.*, No. 93 CIV. 0178 (LMM), 1993 WL 276058 (S.D.N.Y. July 21, 1993) (only putative class names and last known addresses disclosed); *Masson*, 2005 WL 2000133 (same). Defendants should be required to disclose only names and last known addresses of the FLSA putative class. *See e.g., Fasanelli*, 516 F. Supp. 2d at 324 (holding that defendant need not provide private information such as Social Security numbers, telephone numbers, work location and dates of employment for notification purposes); *see also Hintergerger v. Catholic Health Sys.*, No. 08-CV-380S, 2009 WL 3464134, at *1 (W.D.N.Y. Oct. 21, 2009) (holding that defendants need not produce phone numbers, social security numbers, dates of birth, and e-mail addresses.)

It also appears that Plaintiffs are requesting that the notice be posted at Defendants' locations, although this request is unclear, appearing in one section but not another, and is without support or explanation. Defendants oppose the requirement of posting notice as it serves no real purpose in this case. Any current employees who are properly within the putative class will receive the notice at the address provided by Defendants if the Court orders a notice to be sent. Similarly, any former employees will not be there to see a posted notice. Courts have held that mailing of notices is the preferred method and that posted notice is ordinarily unnecessary. *See e.g., Shajan v. Barolo, Ltd., No.* 10 CIV. 1385 (CM), 2010 WL 2218095, at *2 (S.D.N.Y. June 2, 2010) ("Since all current employees will be receiving the notice [via mail], there is no need to require defendants to post the notice in the workplace."); *Hinterberger*, 2009 WL 3464134 (same); *Han v. Sterling Nat. Mortgage Co.*, No. 09-CV-5589 JFB AKT, 2011 WL 4344235, at *12 (E.D.N.Y. Sept. 14, 2011) (premature to require employer to post notice in workplace).

3. The Notice Mischaracterizes The Rights Of The Putative Class And The "Publication Order" And Consent Form Are Virtually Incomprehensible

The proposed notice does not clearly give putative class members an understanding that they do not have to opt in to this matter or that they will not lose their rights to sue under the FLSA by not opting in. As such, the notice should be amended to clearly provide from the outset that putative class members are not required to join. It is also confusing as to why opt in notice forms, even those where a class member is choosing another lawyer, should be sent directly to plaintiff's counsel. Further, it should be made clear to putative class members that they are not giving up their FLSA rights by refusing to join this lawsuit. *Enriquez*, 2012 WL 440691, at *3 (amending opt in notice setting forth potential plaintiffs' right not to opt in and to bring individual claims in separate lawsuits). The notice also fails to notify the putative class that they may seek further information about the case from Defendants. *See e.g., Guzman v. VLM, Inc.*, 2007 WL 2994278, at *7-8 (E.D.N.Y. Oct. 11, 2007). The proposed opt in form also does not make sense as the second box (and it is unclear why boxes are added) is not a comprehensible sentence.

The proposed notice also characterizes the alleged meal deductions and uniform maintenance policies as being "illegal" rather than "unlawful." This language should be deleted as it improperly implies criminal standards and allegations.

Further, reference to the New York Labor Law should be deleted as irrelevant and confusing. Also, the first full sentence on page 2 of the proposed notice does not make sense as it states: "If you worked as for all locations of the Fay Da Bakery…" Additionally, most of the last few pages of the proposed notice seem to be repetitive and can be deleted.

Even a cursory reading of the Publication Order (Plaintiffs' Mem., Ex. 6.) and the Consent Form (Plaintiffs' Mem., Ex. 5.) show they are filled with inconsistencies and references to matters that have nothing to do with this case. By way of example:

- The Proposed Publication Order references a proposed "notice of Pendency and Consent to Joinder" form and there is no such titled proposed form submitted;
- It is confusing as to why paragraph 2 of the Proposed Publication Order

specifically references one paragraph that is already in the Notice. Further, this language should make clear that no one is obligated to opt in to this matter.

- The Proposed Publication Order at paragraph 4 references publication in English and Chinese and then references Spanish interpreters.
- The Proposed Publication Order at paragraph 6 is not a comprehensible sentence.
- The Consent to Join form improperly requires that consent forms be sent to Plaintiffs' counsel and is inconsistent with the Notice which states such forms should be filed with the Court.
- The Consent to Join form references "Illegally Retained Tips, Unlawful Deductions and Unlawful Kickbacks" all of which are completely irrelevant to the claims asserted herein.

4. Undocumented Alien Language Is Too Prominent

Plaintiff's efforts to place language related to immigration status and payment in cash in bold letters at the end of the notice is improper and is only meant to act as a teaser for potential opt ins. In fact, the similar language proposed by Plaintiffs was rejected in *Enriquez* as to both form and placement. *Enriquez*, 2012 WL 440691, at *4 (rejecting language related to immigration status and payment in cash in the proposed notice stating that its "size and placement…are unnecessarily inflammatory".) Instead, that court ordered that such language be moved to the end of another paragraph and replaced with language simply indicating that potential plaintiffs may be owed payment even if they were paid in cash and regardless of their immigration status. *Id.* at *4.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied in its entirety or, in the alternative, the proposed notice and other forms should be subject to negotiation and/or amended as discussed herein.

Dated: June 13, 2016
Jericho, New York

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JING FANG LUO, and SHUANG QIU HUANG, individually and on behalf of others similarly situated,

Plaintiffs,

-against-

PANARIUM KISSENA INC. d/b/a Fay Da Bakery; PANARIUM INC. d/b/a Fay Da Bakery; BOULANGERIE DE FAY DA INC. d/b/a Fay Da Bakery; Patisserie de fay da, LLC d/b/a Fay Da Bakery; LE PETIT PAIN INC. d/b/a Fay Da Bakery; BRAVURA SKY VIEW CORP. d/b/a Fay Da Bakery; LA PAN MIETTE INC. d/b/a Fay Da Bakery; FAY DA (QUEENS) CORP. d/b/a Fay Da Bakery; FAY DA MOTT ST., INC. d/b/a Fay Da Bakery; FEI DAR, INC. d/b/a Fay Da Bakery; LE PAIN SUR LE MONDE INC. d/b/a Fay Da Bakery; BRAVURA LLC d/b/a Fay Da Bakery; CHI WAI CORP. d/b/a Fay Da Bakery; PHADARIAN CORP. d/b/a Fay Da Bakery; FAY DA MAIN STREET CORP. d/b/a Fay Da Bakery; TORTA DI FAY DA d/b/a Fay Da Bakery; BRAVURA PATISSERIE d/b/a Fay Da Bakery; NICPAT CAFÉ INC. d/b/a Fay Da Bakery; FAY DA MANUFACTURING CORP.; FAY DA HOLDING CORP. d/b/a Fay Da Bakery; FAY DA HOLDING GEN 2 CORP. d/b/a Fay Da Bakery; HAN CHIEH CHOU and KELLEN CHOW,

Defendants.

Civil Action No.
15-cv-03642 (WFK) (SLT)

AFFIDAVIT OF SERVICE

ECF CASE

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

Laurie J. Tarlov, being duly sworn, deposes and says, that deponent is not a party to this action, is over 18 years of age and resides in Hauppauge, New York; that on the 13th day of June 2016, deponent served a true and correct copy of **DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION AND COURT AUTHORIZED NOTICE** in this matter upon:

John Troy, Esq.
Troy Law, PLLC
41-25 Kissena Boulevard, Suite 119
Flushing, NY 11355

at the address designated by said party for that purpose by depositing a true copy of same enclosed in a postage-paid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York and via electronic mail.

Laurie J. Tarlov

Sworn to before me this
13th day of June 2016.

Notary Public

Robert D. Lipman
Notary Public, State of New York
No. 02LI4972967
Qualified in Nassau County
Commission Expires October 9, 2018